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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 407

STEPHEN A. SULENTICH,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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INDEX

	PAGE
The Alleged Fraud of Petitioner	2
The Failure of this Court of Appeals to Review Count II	8
The Shipowner's Liability Convention Eliminates Respondent's Defense of Fraud	9
Conclusion	11

CITATIONS.

CASES.

Desch v. U. S., 186 F. 2d 623	9n
Garrett v. Moore-McCormack Company, 317 U.S. 239	7
Panama Steamship Co. v. Vargas, 281 U.S. 670	9n
Sea's Shipping Co. v. Surracki, 328 U.S. 85	10
U. S. v. Rodgers, 159 U.S. 49	10n
Victory Towing Co. v. Bordelon, 219 F. 2d 540	9n
Weiss v. Central Railroad of New Jersey, 235 F. 2d 309	10

STATUTES.

1 U.S.C. Sec. 3	10n
46 U.S.C. Sec. 251	10n

TREATY.

Shipowner's Liability Convention, 54 Stat. 1693	9, 10, 11

RULES OF COURT:

Rule 46½, U. S. S. Ct. Admiralty Rules	9n
Rule 52, F.R.C.P.	9, 9n
Rules of the District Court for the Northern District of Illinois:	
Admiralty Rule 33	9n
Civil Rule 19	9n

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Petitioner's reply to respondent's brief in opposition to certiorari may not have been available to the Court for consideration at the time certiorari was denied. This petition for rehearing will supplement the petition for certiorari, respondent's opposing brief, and petitioner's r[illegible]. It will set forth substantial grounds not pre-vi[illegible] presented.

THE ALLEGED FRAUD OF PETITIONER.

Respondent's opposing brief (pp. 2-3) restates the issues tendered by the petition for certiorari. The first such issue relates to alleged post-employment fraud of petitioner.[1]

The main stress of respondent's brief on that issue seems directed to the purpose of discrediting petitioner, largely by marshalling selective portions of the evidence to demonstrate that he was in fact guilty of fraud. (Resp. Br, pp. 3-8)

The petition for certiorari did not go into the question of the sufficiency of evidence to support respondent's affirmative defense of fraud. Instead, it presented a clear question of law for this Court to decide, concerning the legal effect of fraud occurring some weeks after the seaman had been employed and engaged in the service of the ship; and involving alleged misrepresentations having no causal connection with the injury he suffered.

Petitioner's failure to argue the sufficiency of the evidence to sustain that defense was deliberate, for the purpose of narrowing the issues before this Court. Petitioner did not and does not concede that petitioner had been, in fact, guilty of fraud. It is believed, and petitioner accordingly asserts, that the evidence as a whole

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[1] Respondent's restatement inaccurately refers to the physical examination, occurring five weeks after petitioner had been employed, as having been "held as soon as practicable."

That statement has no support in and is contrary to the record.

Captain Brightstone of the Steamer Mills testified in detail concerning the numerous ports at which the vessel had docked during the five weeks petitioner was on board preceding his illness and fall. They included Cleveland, the home office of respondent, as well as Buffalo; South Chicago; Indiana Harbor; and Erie, Pennsylvania. (R 84-95)

in the record will compel the conclusion that petitioner, rather than being a perpetrator of fraud, was a victim; *and will demonstrate the wisdom of the rule of law requiring fraud to occur at the time of employment.*

Respondent in seeking to demonstrate that petitioner was guilty of fraud, quotes (pp. 6, 7) from the deposition of a Dr. Schuman, the physician who examined petitioner.

Schuman had no recollection whatsoever of examining petitioner, or even of being on board the steamer Mills. (A, 323, 325). His testimony was entirely a reconstruction of events, as shown, by a report of medical examination. He enacted the role of a witness.

The report thus used by Schuman was not the handwritten report which he had filled out and signed (Def. Ex. N, Pet. for Cert. p. 15a) but the typewritten report which he and petitioner had signed in blank and sent to respondent's home office, where typewritten entries were made thereon. (Def. Ex. O, Pet. for Cert. p. 16a).

Radical differences exist between the two reports. Of critical importance is the fact that the handwritten report contained no entry opposite the items calling for a history of back pain, or receipt of disability compensation, while the typewritten report had the word "no" opposite those items.

Respondent sought to explain these and other discrepancies between the two documents by evidence that by leaving a space blank, Schuman intended to report negative or normal. (A. 341). Were such an explanation to be accepted at face value, the accuracy of the typewritten report, and the reliability of Schuman's testimony

reconstructing the events that that report portrayed, are founded and depend upon the assumption that Schuman made inquiry concerning all items on the form, in the course of his examination of petitioner; and that Schuman did not, either purposely or inadvertently, fail to interrogate petitioner concerning certain items, thereby causing negative answers to be entered improperly on the typewritten form.

That basic assumption—necessary to validate the typed report and Schuman's testimony—is demonstrably unsound. Neither report had any entries opposite the items: age, height, weight and Wasserman. Dr. Ramsay, Schuman's employer, could not explain the absence of these entries. (A. 362).

Nor can these omissions be justified by any custom. The contrary is true. Respondent introduced in evidence 12 other reports by Dr. Schuman to show his customary practices in making entries.

All 12 of these other reports had entries opposite the items: age, height and weight. (A. 360).

Thus the basic assumption that Schuman obtained a complete history from petitioner in the course of his examination is positively disproved by respondent's own evidence. Petitioner testified positively that he had not been interrogated by Schuman concerning prior back trouble or receipt of disability compensation (A. 217, 235). The evidence of both parties is in accord on the incompleteness of Schuman's interrogation of petitioner.

Further corroboration of Schuman's failure to interrogate petitioner thoroughly is found in the fact that he used checkmarks on the handwritten report to indicate negative findings. There would obviously be no

need for checkmarks in the spaces to indicate a negative, if leaving the spaces blank automatically indicated a negative.

The checkmarks were clearly made to guarantee that the item checked had been covered during the examination. It is hardly consistent to leave items blank at the top of a form to indicate a negative finding, while using checkmarks in the lower half of a form to indicate a negative. If precaution demands a checkmark, that demand is applicable to history as it is to findings. Indeed, respondent's own evidence indicated the importance of the medical history of the seaman. (A. 297, 298, 308, 309, 369).

Nonetheless, respondent's explanation for absence of any checkmark or entry relating to back pain or disability compensation in the top part of the form was a custom by Schuman to have blank spaces there indicating negatively, and checkmarks to so indicate in the lower portion. Dr. Ramsay so testified for respondent. (A. 341).

Schuman's testimony and the typed report which the testimony reconstructed are further discredited by the manner in which the evidence was adduced by respondent to support its affirmative defense of fraud. Schuman's testimony consisted of a deposition of Schuman taken by respondent in New York City. At the deposition, the typed report, but not the handwritten report made by Schuman was produced. The handwritten report was retained by respondent at Cleveland. (A. 332).

On his direct examination, Schuman testified as if the typewritten report were the only one in existence. (A 299-302, 306-316) Only on cross examination was it learned that he had signed the typewritten report completely blank and that the real report was one in his own handwriting

which was not then available for use in his cross examination. (A. 329-330). When it developed on cross examination of Schuman that the typed report had not been made by him but only signed in blank, he volunteered information designed to justify his use of the typewritten report. Questions and answers were then asked and given (A 331, 332) as follows:

> "Q. Have you been shown your original report with your own handwriting, 'yes' or 'no,' Doctor, by Mr. McCreary? (Attorney for respondent)
>
> • • •
>
> A. He showed me the original of this Defendant's Exhibit A for identification, my copy. He showed it to me the first time when I met him, and I compared it with this, and it was similar to my copy which I had originally written about this history and physical examination, and I compared both papers, and it was identical.
>
> Q. When did you compare these papers?
>
> A. The first time I met Mr. McCreary about a month ago; it was about a month ago or about a month or two ago. I don't remember the exact time.
>
> Q. And at this time you are willing to state unequivocally that everything contained in your handwriting on that report is identical to this?
>
> A. Yes, sir.
>
> Q. Identical to this Defendant's Exhibit A for identification?
>
> A. Yes, sir."

Schuman's testimony was not in accord with the facts, and apparently designed to conceal differences between the two reports.

It was, of course, plain to respondent's counsel from the cross examination that Schuman's real report, the handwritten one, would have to be adduced in evidence

at the trial. On redirect examination, Schuman then testified concerning his custom of sometimes allowing spaces to remain blank to indicate a negative and sometimes entering checkmarks to indicate a negative. (A 333-334).

Counsel for petitioner had not seen the handwritten report until after Schuman's deposition was taken, but did see it by the time Dr. Ramsay testified for respondent. Numerous discrepancies were called to the attention of Ramsay. (A 365-368). He completely failed to explain entries on the typed report showing petitioner's urine to have a specific gravity of 1.020, and an acid reaction, when the handwritten report had no entry of any kind relating to those matters. (A 367).

Despite the discrepancies between the two reports, the trial judge allowed the testimony of Schuman to be received, "he said he compared (the typewritten report) with the one he made out in his own hand-writing." (A 336).

This was the evidence which caused petitioner to be branded a deliberate fraud despite his denial of being interrogated concerning prior back trouble.

This court in *Garrett* v. *Moore-McCormack Company*, 317 U.S. 239, (1942) required admiralty principles to be applied in judicial scrutiny of dealings between seamen and shipowners. It is difficult to reconcile the actions of the Courts below with this Court's teachings.

At the time the seaman is considering entering on duty as a seaman, he is free to decide whether he will execute a blank form. Once in the service of the ship, he naturally feels an obligation of obedience to the dictates of his employer. The record as a whole, including the

manner in which respondent caused petitioner to execute forms, one completely and another partially blank, demonstrates the soundness of the rule that only fraud at the time of the engagement constitutes a defense in an action to enforce seamen's remedies. Petitioner has been found guilty of fraud based on entries made on the forms after he signed them, having been ordered to sign the forms while in the service of respondent.

THE FAILURE OF THE COURT OF APPEALS TO REVIEW COUNT II.

The third question presented by petitioner in the petition for certiorari relates to the failure of the Court of Appeals to review the action taken under Count II for maintenance and cure, because of certain statements singled out in petitioner's brief filed with that Court. Respondent in "restating" this question radically alters it so as to substitute for it another of its own choosing. Respondent's restatement ignores the ruling of the Court of Appeals that petitioner in his brief had waived error under Count II. Respondent instead seeks to uphold the failure of the Court of Appeals to review Count II on the ground that the finding of no injury made by the trial court required its decree to be sustained if review were had. The reason assigned by the Court of Appeals for denying review of Count II was undefended because indefensible.

The discretion granted this Court to review or deny review on certiorari presupposes that review may be had by a Court of Appeals. Concededly this Court cannot review every decision by the Courts of Appeal; but claimants in federal courts are entitled to review of District Court action. That right, denied by the Court of Appeals,

will be denied petitioner here, unless this Court grants certiorari.

THE SHIPOWNER'S LIABILITY CONVENTION ELIMINATES RESPONDENT'S DEFENSE OF FRAUD.

The Shipowner's Liability Convention grants a seaman a remedy of maintenance and cure for sickness as well as injury. The complaint alleged that petitioner became sick and disabled, these allegations being incorporated free from the charge of negligence, in Count II, (A 7, 8). Respondent does not contest the fact that petitioner became sick and disabled while in the service of the ship, nor the proposition that such sickness makes the finding of no injury inadequate to support the Court's decree under Count II.[2]

Nor was any request for a finding of sickness necessary. According to the provisions of Rule 52, "requests for findings are not necessary for purposes of review".[3]

Respondent's assertion that petitioner has failed to establish that the Shipowner's Liability Convention applied to the *locus in quo* of the alleged accident (Resp. Br. p. 14) is not accurate. Admissions made by the

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[2] The findings must sustain the decree. **Panama Mail Steamship Co. v. Vargas**, 281 U.S. 670 (1930); **Desch v. U.S.**, 186 F. 2d 623 (C.A. 7 1951); **Victory Towing Co. v. Bordelon**, 219 F. 2d 540, (C.A. 8, 1955.)

[3] Both Rule 46½ of the Admiralty Rules of this Court and Rule 52 of the Federal Rules of Civil Procedure require the trial court to "find the facts specially." The Rules of the District Court of the Northern District of Illinois make Rule 52 of the Federal Rules applicable to the findings and decree in this case. Local Admiralty Rule 33 is a catch-all making local civil rules applicable to admiralty proceedings. Local civil Rule 19 is a similar catch-all, making Rule 52 of the Federal Rules apply because of the lack of any other governing provision.

pleadings, coupled with the terms of the convention, clearly bring petitioner within the protection of the convention.[4]

The Shipowner's Liability Convention in clear and unmistakable language confines the defense of fraud to that occurring "when the engagement is entered into." (Article 2.2(c), Pet. for Cert. p. 3a). This Court has ruled that in the field of seamen's remedies, there is a "common core of policies which has been controlling although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under the statutory field." (*Sea's Shipping Co.* v. *Surracki*, 328 U.S. 85 (1946) at p. 99). At least one Court of Appeals has honored this principle "Generally the criteria for determining whether or not plaintiff is a 'seaman' for purposes of maintenance and cure are the same as those governing his right to re-

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[4] By Article I of the convention it is applicable to all persons on board of vessels other than warships, registered in a territory for which the convention is in force, and ordinarily engaged in maritime navigation. The application is further delineated by U.S. understandings annexed to and a part of the convention. (Pet. for Cert., App. pp. 3a-4a).

According to the U.S. understandings, the phrase "vessels registered in the territory" includes all vessels of the United States as defined under the laws of the United States. "Vessel" is defined, 1 U.S.C. Sec. 3, broadly to include "every description of watercraft . . . capable of being used as a means of transportation on water." Again, 46 U.S.C. Sec. 251 provides in part: "Vessels of 20 tons and upwards enrolled . . . and having a license in force shall be deemed vessels of the United States . . ." The complaint alleges and respondent's answer concedes that the steamship Mills was "a vessel duly enrolled and licensed . . . of more than 20 tons burden . . . and employed in the business of commerce and navigation between places in different states and territories upon the Great Lakes and foreign countries . . ." during the time of all events mentioned in the complaint (A 4, 14). Brightstone, Captain of the steamer Mills, testified that the ship was registered with the United States Coast Guard (R 96). The Great Lakes, being largely international bodies of water, separating the United States from Canada, are a part of the "High Seas." U.S. v. **Rodgers**, 150 U.S. 49 (1893).

cover under the Jones Act, 46 USC 688." (*Weiss* v. *Central Railroad of New Jersey*, 235 F. 2d 309 (C.A. 2d, 1956)

Accordingly, the limitation imposed by the treaty on the defense of fraud in maintenance and cure actions, is applicable to the Jones Act action.

The Court of Appeals, by failing to review Count II for maintenance and cure, allowed the judgment to stand thereunder in direct conflict with the mandate of the convention; and disregarded the teaching of this Court in the *Sea's Shipping Company* case in failing to apply the principle of the convention to the statutory right involved in Count I.

CONCLUSION.

For the reasons asserted herein, in addition to those previously asserted in the petition for certiorari and the reply to respondent's brief in opposition, it is respectfully submitted that certiorari should be granted. The issue on certiorari is whether seamen's suits are to be given fair and thorough consideration by lower Federal Courts in deference to the decisions of this Court.

Respectfully submitted,
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Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JAMES A. DOOLEY,
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